Upper Tribunal
(Immigration and Asylum Chamber)

Johnson (deportation – 4 years imprisonment) [2016] UKUT 00282 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26 April 2016	
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Before

The Hon. MR JUSTICE TURNER
UPPER TRIBUNAL JUDGE JORDAN

Between

The Secretary of State for the Home Department

Appellant

and

Remmond Johnson

Respondent

Representation:

For the Secretary of State:	Mr S. Kotas, Home Office Presenting Officer
For Mr Johnson:	Mr D. Lemer, Counsel, instructed by Howe & Co., Solicitors

When a foreign offender has been convicted of an offence for which he has been sentenced to imprisonment of at least 4 years and has successfully appealed on human rights grounds, this does not prevent the Secretary of State from relying on the conviction for the purposes of paragraph 398(a) of the Immigration Rules and s.117C of the 2002 Act if and when he re-offends even if the later offence results in less than 4 years imprisonment or, indeed, less than 12 months imprisonment.

DECISION AND REASONS

1. In the re-making of the decision, following a finding that the First-tier Tribunal Judge had made an error on a point of law, we shall revert to the terminology adopted in the First-tier Tribunal in describing Mr Johnson as 'the appellant'.

The application for an adjournment

2. Mr Lemer renewed an application to adjourn the hearing which we refused for the reasons given in a short oral decision. In particular, we were not satisfied that the appellant had provided any adequate explanation for his being in funds for the purposes of the hearing today but not in funds a few days ago when the application was made. Further, there has been ample opportunity for the appellant to secure evidence from a social worker as to the effect on the children and the overriding objective is not suited to delay the hearing on the purely speculative basis on what such a report might contain. Neither the respondent nor the Tribunal disputes the fact that the appellant has a genuine relationship with his children and family members or they with him.

The immigration history

3. The appellant was born on 5 October 1980 and came to the United Kingdom when he was 6 in 1986 or 1987. He first came to the attention of the authorities in October 2001 when he was 21 years old following his arrest for theft, apparently from his employer. When his case was considered by the Tribunal in 2009, there were 11 convictions for 22 offences recorded against him. By adding offences committed in 2013, and by reference to the Police National Computer print-out submitted under cover of the respondent's skeleton argument, Mr Kotas calculates the tally as now standing at 15 convictions for 50 offences. In the scheme of things, the precise number is immaterial. The offences were mainly offences of dishonesty in various forms, assault and threatening abusive or insulting conduct.

4. On 13 July 2007 at Chelmsford Crown Court the appellant was convicted on two counts of possessing Class A controlled drugs with intent to supply following a not guilty plea to which he was sentenced to 4 years imprisonment, ('the 2007 convictions'). He was released in 2009 after serving 2 years of his sentence. His subsequent appeal against a deportation order was allowed by the Tribunal in 2009 on proportionality grounds applying a broad Article 8 brush.

5. In 2013, he was convicted of 7 counts of making off without payment, 9 counts of driving whilst disqualified, and 8 counts of using a motor vehicle without insurance, ('the 2013 convictions'). This was part of a criminal spree that took place from 2 November 2012 to 8 April 2013, presumably about a year after the end of his period on licence. The disqualification had been imposed for other offences only a month before.

Paragraph 398

6. Paragraph 398 has been amended since the Secretary of State made her

decision. At the time the decision was made on 28 January 2014, the Rules in bracketed sections in italics have since been omitted by rule changes introduced on 28 July 2014. Hence the respondent's decision maker properly applied the old law; the First-tier Tribunal Judge was, however, required to apply the new law in her decision promulgated on 24 October 2014 as, of course, do we.[1] The changes are reflected in the words set in square brackets. Together, these provide:

> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> > (a) the deportation of the person from the UK is conducive to the public good [and in the public interest] because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least four years;
> >
> > (b) the deportation of the person from the UK is conducive to the public good [and in the public interest] because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
> >
> > (c) the deportation of the person from the UK is conducive to the public good [and in the public interest] because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, (*it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors*) [the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.]

7. The changes set out above were noted by Aikens LJ in *YM (Uganda) v Secretary of State for the Home Department* [2014] EWCA Civ 1292 (10 October 2014) and are set out here to note the growing emphasis the Secretary of State places upon her own developing policies on the public interest in removing foreign offenders who have been sentenced to periods of imprisonment. As we shall see, with the introduction of s. 117A-C, there has been a shift away from simple reliance on the Immigration Rules (brought into effect by Statutory Instrument) and Parliament's use of Statute albeit in the form of a statutory requirement for the Tribunal to 'have regard to' the specified criteria. Whilst the terms of Article 8 (and in particular, the terms of Article 8(2)) remain constant, the movement since the First-tier Tribunal reached its decision in 2009 is to crank up the place of the public interest criteria (but not necessarily their weight) in the proportionality balance.

[1] *YM (Uganda) v Secretary of State for the Home Department* [2014] EWCA Civ 1292 (10 October 2014), paragraphs 38 and 39.

The application of paragraph 398

8. The First-tier Tribunal Judge considered that paragraph 398(a) had no application since the relevant offences for her purposes were the 2013 convictions for which the appellant received a sentence of 10 months imprisonment. Hence, neither 398 (a), (4 years imprisonment) nor paragraph 398(b), (imprisonment of less than 4 years but at least 12 months) had any application. This resulted in the Judge treating the appellant as falling within paragraph 398(c) which, for our purposes, was as '*a persistent offender who shows a particular disregard for the law*', a classification which the appellant himself does not (and, of course, cannot) seek to argue against.

9. The consequences of an application under paragraph 398(a) are striking: the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A. They represent a practical and linguistic up-lift from the 'exceptional circumstances' originally envisaged in paragraph 398.

10. Mr Lemer conceded that he was not able to identify any very compelling circumstances sufficient to outweigh the pressure in favour of the appellant's deportation. Hence, if the appeal is to be assessed by reference to paragraph 398(a), he accepts that the appellant loses his appeal.

11. In contrast, the application of paragraph 398(c) – the persistent offender categorisation – allows an appellant to rely upon both paragraph 399 and 399A:

> 399. This paragraph applies where paragraph 398(b) or (c) applies if – (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK and (i) the child is a British citizen; or (ii) the child has lived in the UK continuously for at least the seven years immediately preceding the date of the immigration decision; and in either case
>
> > (a) (*it would not be reasonable to expect the child to leave the United Kingdom*) [it would be unduly harsh for the child to live in the country to which the person is to be deported]; and
> >
> > (b) (*there is no other family member who is able to care for the child in the United Kingdom*) [it would be unduly harsh for the child to remain in the UK without the person who is to be deported];
>
> or (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, [or] settled in the UK, (*or in the UK with refugee leave or humanitarian protection*,) and ((*i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and (ii) there are insurmountable obstacles to family life with that partner continuing outside the United Kingdom*)

[(i) the relationship was formed at a time when the person was in the UK lawfully and their immigration status was not precarious; and
(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM; and
(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported].

399A. This paragraph applies where paragraph 398(b) or (c) applies if – *((a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or (b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.*)
[(a) the person has been lawfully resident in the UK for most of his life; and
(b) he is socially and culturally integrated in the UK; and
(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported].

12. Mr Johnson is unable to rely upon the relationship he has with either of his partners for the reasons that will later emerge. There is no suggestion that the children will be expected to travel to Sierra Leone which the respondent concedes would be unduly harsh for them. The issue is, therefore, reduced to a consideration of whether it would be unduly harsh the child to remain in the UK without the person who is to be deported.

13. For the reasons that follow, Mr Johnson's appeal must fail at the first hurdle.

14. Mr Lemer submitted that paragraphs 398(a) and 398(c) were alternatives and the Secretary of State was required to select which of the two routes she chose to pursue. He based this submission on the effect of the words of s.117C (7)) of the Nationality, Immigration and Asylum Act, 2002.

15. Part 5A of the 2002 Act was introduced by s.19 of the Immigration Act 2014 setting out criteria, pursuant to s.117A to which the court or tribunal must have regard (amongst other matters):

117CArticle 8: additional considerations in cases involving foreign criminals
(1)The deportation of foreign criminals is in the public interest.
(2)The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
(3)In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(5)Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
(6)In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
(7)The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

16. Mr Lemer submitted that the underlying decision to deport the applicant was the decision made in January 2014 to deport the appellant as a result of the 2013 convictions. Pursuant to s.117C (7), the only consideration that the appellant was permitted to take into account was the conviction which resulted in a sentence of 10 months imprisonment. This was because the statutory criteria set out in s.117C are limited to the reason for the decision being the offence or offences for which the criminal has been convicted.

17. This requires consideration of the decision letter. On page 3 of 6 of the letter, under the heading '*Sentence length*' the decision maker set out in full all three limbs (sub-paragraphs (a), (b) and (c)) of paragraph 398 and then continued:

> As stated earlier in this letter, deportation action is being considered against you on conducive grounds in light of your 2013 convictions for making off without payment, driving while disqualified and using a vehicle without insurance.

18. Mr Lemer relied on this as supporting his submission (as well as the introductory paragraph of the letter which recited the 2013 convictions under the heading '*Liability to Deportation*' but omitted reference to the 2007 convictions until later on the same page when it was mentioned under '*Background*'. The submission fails to take into account the words that immediately follow:

> However, it is noted that you were sentenced in 2007 to 4 years imprisonment for possessing controlled drugs with intent to supply. Paragraph 398 (A) of the rules is therefore applicable when considering Article 8 in your case.
> The Immigration Rules state that it will only be in exceptional circumstances that a person's right to family and/or private life would outweigh the public interest in seeing a person deported where they had been sentenced to a period of imprisonment of at least four years.
> **Exceptional circumstances**
> Consideration has been given to your personal circumstances, as well as those family members affected by the decision to deport you. It has been concluded that the reasons given below that there are no exceptional

circumstances in your case which would outweigh the public interest in seeing you deported.

19. Thereafter, due consideration is given to the appellant's family and private life which included specific reference to his daughters and partners and C.

20. Insofar as Mr Lemer seeks to argue that the respondent is restricted to a consideration of the 2013 convictions, he misconstrues the words of s.117C (7) which does not contain the limitations he seeks to impose. If, as a matter of fact, he seeks to construe the decision letter as confining itself to a consideration of the 2013 convictions, he is wrong to do so as the decision maker would have had no reason to set out paragraph 398(a) and then make reference to the 2007 convictions unless the respondent was intending to rely upon them.

21. Finally, it makes no sense to operate a statutory restriction on the criteria that a decision maker must have regard to when, on any view, the earlier offending is a material factor. Mr Lemer did not submit that the decision maker was excluded altogether from reliance upon the 2007 convictions. Rather he argued that the Secretary of State was limited to her consideration of them as part of the (admitted) element found in paragraph 398 (c) that the appellant was a persistent offender who had shown a particular disregard for the law. It seems to us that it is sophistry to construe the appellant's sentence of 4 years as an inadmissible criterion for the purposes of paragraph 398(a) but admissible as a criterion in paragraph 398(c).

22. Mr Lemer also argued that the structure of paragraph 398 only permitted the respondent to rely upon one of the three classifications (a) to (c). He submitted that the respondent had a choice as to which route under paragraph 398 he intended to follow in securing a foreign criminal's removal. In doing so, he relied upon the use of the word '*or*' at the end of subparagraph (b).

23. We reject this argument. The draftsman envisaged options when creating the three categories set out in paragraph 398. Had the draftsman used the word '*and*', the effect would have been that each of the three requirements had to be satisfied. That would have been impossible since the same person could not both have been sentenced to at least four years imprisonment as well as less than four years. Whilst the use of the word '*and*' connotes cumulative or conjunctive requirements; the word '*or*' connotes alternatives but is silent on whether the person qualifies under one or more of the specified categories.

24. He submitted that the Secretary of State elected to apply paragraph 398(c) – the persistent offender route – and did not choose to invoke paragraph 398(a). This, however, is a clear misreading of the decision letter in which the Secretary of State expressly relied upon both

paragraph 398(a) and the fact that the appellant had been sentenced to a period of 4 years imprisonment as well as the fact that the appellant was a persistent offender.

25. No assistance was provided by Mr Lemer's reliance on the decision in the Court of Appeal in *YM (Uganda) v Secretary of State for the Home Department* [2014] EWCA Civ 1292 (10 October 2014) in which Counsel for the Secretary of State had submitted that sequential offending which resulted in a total period of imprisonment of over four years fell within paragraph 398(a). Aikens LJ (with whom the others members of the Court agreed) rejected that interpretation. He stated:

> 43. The wording of Rule 398 in its 2012 version is unsatisfactory because, although it is meant to be part of a "complete code" it does not deal with the very many different possible circumstances that might arise. Nonetheless, the wording refers to "an offence" not more than one. Even if the singular included the plural, it would be necessary to import more words into Rule 398(a) if the aim was to take account of all the person's offences historically, then tot up all the sentences of all those offences, so as to make a grand total of a period of imprisonment which, in total for a number of different offences on different occasions, amounted to at least four years. I am not prepared to manipulate the wording of Rule 398(a) to such an extent to produce that result. We have to construe the words sensibly in their normal and natural meaning.
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> 44. Therefore, in my view, only one offence at a time has to be taken into account and the only question is whether, for that particular offence, the sentence was more than 4 years.

26. This reasoning is consistent with the Secretary of State's approach in the present appeal based on the fact that the appellant *had been* convicted of *an offence* for which he had been sentenced to at least 4 years imprisonment.

27. We recognise the possibility of an appellant being sentenced to 4 years imprisonment as a young man and subsequently succeeding in his appeal on Article 8 grounds and thereafter leading a blameless life for the following 40 or 50 years until a second short period of imprisonment triggers the consideration of paragraph 398(a). In such a case, however, the significance of his earlier sentence would have receded to the point of its being immaterial to the consideration of what should happen to the appellant following his second conviction. We see this as a paradigm example of a very compelling circumstance sufficient to protect the appellant against expulsion.

28. In most circumstances, however, a successful appeal on human rights grounds, notwithstanding a period of imprisonment of four years, can only have been predicated upon the appellant satisfying the Tribunal that he has turned the corner and that he no longer represents a risk to society. In many cases it will have been accompanied by an express warning from the Secretary of State or the Tribunal that further

offending would not be tolerated. In the present appeal this appears to be what the appellant's partner was suggesting when, in paragraph 45 of the decision, it is said that she could not remember if the appellant had made any promises at the 2009 hearing but she assumed he had. It is however self-evident that, in order to succeed in such an appeal, the appellant would have had to have satisfied the Tribunal that there was to be no more offending. A subsequent conviction would, save in exceptional circumstances, confound this prediction acting, as it were, like the imposition of a suspended sentence following reoffending. We do not therefore, see anything intrinsically unfair in the respondent or the Tribunal applying the words of paragraph 398(a) to all cases in which an appellant has been sentenced to a period of imprisonment of at least four years irrespective of whether it was a later offence that triggered a decision to deport him.

29. Any individual imprisoned for such a significant period of time must have it in his mind that he is living on borrowed time, as it were, and that any further offending may have the consequence that the Tribunal revisits an earlier appeal at which he successfully resisted deportation.

30. Finally, the appellant's contention that, for the purposes of paragraph 398(a) the offence that triggers deportation can only be the most recent offending is nowhere to be found in the words of the paragraph and the expression '*they have been sentenced*'. Had it been the intention to limit the operation of the subparagraph in the manner suggested, it would require drastic rewriting.

Conclusion on the preliminary issue

31. We invited Mr Lemer to address us on this issue as a preliminary matter but we reserved our judgment on the issue until we had also heard his submissions upon the operation of paragraph 398(c). However having now given our judgement on this issue, it disposes of this appeal to the Upper Tribunal. Our conclusion is that, once the appellant has been sentenced to a term of imprisonment of 4 years or more, he falls within the terms of paragraph 398(a) and the Secretary of State is entitled to rely upon it in deciding whether or not to make a deportation order. It is no bar to the Secretary of State that she took no action to deport the offender as a result of the conviction and sentence nor that the appellant successfully appealed following his conviction and sentence. Such a claimant is no longer entitled to rely upon the exceptions set out within s. 117C. Whilst we permitted the exceptions to be argued before us *de bene esse,* this is not a practice which should be followed in other cases since it is simply not material. Ultimately, no decision against a non-national can violate his Article 8 rights but, in the case of a foreign criminal who has been sentenced to at least 4 years imprisonment, the route by which he might avoid removal, as

part of the 'complete code'[2] is to establish the very compelling circumstances over and above those described in paragraphs 399 and 399A; no more, and no less.

32. It is impermissible to rely upon the contents of the respondent's own instructions to case-workers as a means of interpreting the contents of a Statutory Instrument. Immigration Directorate Instructions (IDIs) may be used to identify a policy more favourable to an appellant than the Immigration Rules but cannot impose requirements more onerous to a claimant than the Rules. Hence, the IDIs are of limited use as a means of construction. However, the relevant IDI (Chapter 13) in this case is in the following terms, where material:

> **Chapter 13: criminality guidance in Article 8 ECHR cases**
>
> 2.2.2 Once a foreign criminal has been sentenced to a period of at least four years' imprisonment, he will never be eligible to be considered under the exceptions. This applies even if deportation was not pursued at the time of the four year sentence because there were very compelling circumstances such that deportation would have been disproportionate, and the foreign criminal goes on to reoffend and is sentenced to a period of imprisonment of less than four years. This is because his deportation will continue to be conducive to the public good and in the public interest for the four year sentence as well as any subsequent sentences.

33. This accords with our view of the effect of paragraphs 398 to 399A.

[Paragraphs 34 to 47 of the determination have been omitted from the reported decision.]

DECISION

1. The determination of the First-tier Tribunal has been set aside as containing a material error on a point of law.
2. We re-make the decision allowing the Secretary of State's appeal against the decision of the First-tier Tribunal.
3. We dismiss the appeal of Mr Johnson against the Secretary of State's decision to make a deportation order on all the grounds advanced.

ANDREW JORDAN
UPPER TRIBUNAL JUDGE
28 April 2016

[2] *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192 per the Master of the Rolls, paragraph 16